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Spring Air West, LLC and Consolidated Bedding, Inc. and Alfred Thomas Guiliano, Trustee in Bankruptcy and Carpenters Industrial Council Local No. 2633. Cases 19–CA–32018 and 19–CA–32019

November 25, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondents have failed to file an answer to the complaint. Upon a charge filed by the Union against Spring Air West, LLC (Respondent Spring Air) in Case 19–CA–32018 on July 20, 2009, and against Consolidated Bedding, Inc. (Respondent Consolidated) in Case 19–CA–32019 on July 20, 2009, the General Counsel issued the order consolidating cases, consolidated complaint and notice of hearing (the complaint) on August 31, 2009, against Respondent Spring Air, Respondent Consolidated and Alfred Thomas Guiliano, Trustee in Bankruptcy (collectively the Respondents), alleging that the Respondents have violated Section 8(a)(5) and (1) of the Act.

On October 9, 2009, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on October 14, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondents filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment²

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that the answer must be received on or before September 14, 2009. The complaint further notes that if no answer were filed, the Board may find pursuant to a motion for default judgment that the allegations in the complaint are true. Thereafter, by letter dated September 25, 2009, addressed to the Respondents' attorney, counsel for the General Counsel confirmed with the Respondents' attorney that the attorney had said that no answer would be filed, and informed the attorney that if the Respondents failed to file an answer to the complaint by October 1, 2009, a motion for default judgment would be filed. The Respondents failed to file an answer.

In the absence of good cause being shown for the failure to file a timely answer,³ we grant the General Counsel's Motion for Default Judgment.

On the entire record, the National Labor Relations Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Spring Air is a State of Washington corporation, with an office and place of business in Lacey,

¹ The Board has historically considered a bankruptcy trustee having authority to continue the business to be an alter ego of the company that existed before the bankruptcy petition was filed. *Wheels Transportation Services*, 340 NLRB 1085, 1085 fn. 2 (2003).

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Narricot Industries, L.P. v. _F.3d___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), cert. granted S.Ct.___, 2009 WL 1468482 (U.S. Nov. 2, 2009); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377)

3 It is well established that the institution of bankruptcy proceedings

It is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See, e.g., *Cardinal Services*, 295 NLRB 933, 933 fn. 2 (1989), and cases cited therein. Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See id., and cases cited therein; *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992). Accord: *Aherns Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

Washington (the Lacey facility), where it is engaged in the business of manufacture and distribution of mattresses and related products.

Respondent Consolidated is a State of Delaware corporation, with an office and place of business in Tampa, Florida (the Tampa facility), where it is engaged in the business of manufacture and distribution of mattresses and related products.

Respondent Spring Air is a wholly owned subsidiary of Respondent Consolidated.

The Respondents, during the 12-month period preceding issuance of the complaint, a representative period, in conducting their business operations described above, each derived gross revenues in excess of \$500,000.

Respondent Spring Air, during the 12-month period preceding issuance of the complaint, a representative period, in conducting its business operations described above, sold and shipped from the Lacey facility goods valued in excess of \$50,000 directly to points outside the State of Washington.

Respondent Consolidated, during the 12-month period preceding issuance of the complaint, a representative period, in conducting its business operations described above, sold and shipped from the Tampa facility goods valued in excess of \$50,000 directly to points outside the State of Florida.

Since about June 1, 2009, Alfred Thomas Guiliano has been duly designated by the U.S. Bankruptcy Court, District of Delaware as the trustee in bankruptcy of the Respondents, with full authority to administer the Respondents' operations and to exercise all powers necessary to the administration of the Respondents' businesses.

We find that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, Carpenters Industrial Council Local No. 2633, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals have held the positions set forth opposite their respective names and have been supervisors within the meaning of Section 2(11) of the Act, and/or agents within the meaning of Section 2(13) of the Act, acting on behalf of the Respondents:

Wade Jones Plant Manager, Respondent Spring Air
Katie Sims Vice President, Human Resources,
Respondent Consolidated

The following employees of Respondent Spring Air, the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed at Respondent Spring Air's facility in Thurston County, Washington, excluding office clerical employees, supervisors and guards as defined in the Act.

Since at least 2005 and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and, since then, the Union has been recognized as such by Respondent Spring Air. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from April 15, 2009 to May 1, 2010.

At all material times since 2005, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

About May 4, 2009, the Respondents closed their facilities in Thurston County, Washington, including the Lacey facility.

About May 4, 2009, the Union, telephonically with Jones and Sims, requested that the Respondents bargain about the effects of the closure of the Lacey facility.

About May 4, 2009, Respondent Spring Air, by Jones, referred the Union to Sims at Respondent Consolidated, who, after speaking with the Union, failed to respond to the request for bargaining.

The subject set forth above relates to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The Respondents engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent Spring Air with respect to the effects of this conduct.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondents have been failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees, and have thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order the Respondents to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the Respondents' unlawful failure and refusal to bargain with the Union about the

effects of the Respondents' decision to close the Lacey facility, we shall order the Respondents to bargain with the Union, on request, about the effects of their decision. As a result of the Respondents' unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondents might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to re-create in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondents. We shall do so by ordering the Respondents to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the Respondents shall pay their unit employees backpay at the rate of their normal wages when last in the Respondents' employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondents bargain to agreement with the Union on those subjects pertaining to the effects of its decision to close its facility on the unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondents' notice of their desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondents ceased operations of the Lacey facility to the time they secured equivalent

employment elsewhere, or the date on which the Respondents shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondents' employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁵

Finally, in view of the fact that the Respondents have closed their Lacey, Washington facility, we shall order the Respondents to mail a copy of the attached notice to the Union and to the last known addresses of its former unit employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondents, Spring Air West, LLC, Lacey, Washington, Consolidated Bedding, Inc., Tampa, Florida, and Alfred Thomas Guiliano, Trustee in Bankruptcy, their officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to bargain collectively and in good faith with Carpenters Industrial Council Local No. 2633 as the exclusive collective-bargaining representative of the employees in the unit over the effects of the Respondents' decision to close their Lacey, Washington facility. The appropriate unit is:

All production and maintenance employees employed at Respondent Spring Air's facility in Thurston County, Washington, excluding office clerical employees, supervisors and guards as defined in the Act.

- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union concerning the effects on the unit employees of the Respondents' decision to close their Lacey, Washington facility, and reduce

⁴ See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). Neither the complaint nor the motion specify the impact, if any, on the unit employees of the Respondent's decision to close. Thus, we do not know whether, or to what extent, the refusal to bargain about the effects of this decision had an impact on the unit employees. In these circumstances, we shall permit the Respondent to contest the appropriateness of a *Transmarine* backpay remedy at the compliance stage. See, e.g., *Buffalo Weaving & Belting*, 340 NLRB 684, 685 fn. 3(2003); and *ACS Acquisition Corp.*, 339 NLRB 736, 737 fn. 2 (2003).

⁵ In the complaint, the General Counsel seeks compound interest computed on a quarterly basis for any back pay or other monetary awards. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

to writing and sign any agreement reached as a result of such bargaining.

- (b) Pay to the unit employees their normal wages for the period set forth in the remedy section of this decision, with interest.
- (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Within 14 days after service by the Region, duplicate and mail, at their own expense and after being signed by the Respondents' authorized representative, copies of the attached notice marked "Appendix" to the Union and to their former unit employees who were employed by the Respondents on or after May 4, 2009.
- (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondents have taken to comply.

Dated, Washington, D.C. November 25, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD APPENDIX

NOTICE TO EMPLOYEES

MAILED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Carpenters Industrial Council Local No. 2633, as the exclusive collective-bargaining representative of the employees in the unit over the effects of our decision to close our Lacey, Washington facility. The appropriate unit is:

All production and maintenance employees employed at our Spring Air facility in Thurston County, Washington, excluding office clerical employees, supervisors and guards as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the effects on the unit employees of our decision to close our Lacey, Washington facility, and WE WILL reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay the unit employees their normal wages for the period, with interest.

SPRING AIR WEST, LLC AND CONSOLIDATED BEDDING, INC. AND ALFRED THOMAS GUILIANO, TRUSTEE IN BANKRUPTCY

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."